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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000235-001 DT 07/18/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
K. Waldner
Deputy

STATE OF ARIZONA

GARY L SHUPE

v.

EZEKIEL T OPUROKU (001)

SIMONE ANNE ATKINSON

PHX MUNICIPAL CT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 2010–9024281.

Defendant-Appellant Ezekiel T. Opuroku (Defendant) was convicted in Phoenix Municipal Court of driving under the extreme influence. Defendant contends the trial court erred in admitting hearsay testimony at the hearing on his motion to suppress. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On September 7, 2010, the State filed a Misdemeanor Complaint charging Defendant with driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); and driving under the extreme influence, A.R.S. § 28–1382(A)(1) & (A)(2). The State further filed an allegation that Defendant had a prior conviction for driving under the influence, A.R.S. § 28–1381(A)(3). Prior to trial, Defendant filed a Motion To Suppress alleging the State did not properly obtain a portion of the blood the hospital drew from Defendant.

At the hearing on Defendant's motion, Marcus Herrold testified he was eastbound on Glendale Avenue approaching the intersection with 19th Avenue after midnight on June 25, 2010. (R.T. of Apr. 26, 2011, at 12.) He had a green light, and a vehicle traveling south on 19th Avenue ran the red light and collided with his vehicle. (*Id*. at 12–14.) He identified Defendant was the driver of the other vehicle, and described him as being non-responsive. (*Id*. at 13, 15.) Melissa Mitchell testified she was a passenger with Mr. Herrold, and essentially described the same situation. (*Id*. at 16–17.)

Officer Earl Erickson testified he was on duty on June 25, 2010. (R.T. of Apr. 26, 2011, at 8.) At about 12:15 a.m., he responded to a collision at 19th Avenue and Glendale Avenue, where he saw an overturned pickup truck and a vehicle with extensive front-end damage. (*Id*. at 8–9.)

Officer Peter Kriz testified he was on duty on June 25, 2010, when he responded to a collision at 19th Avenue and Glendale Avenue at about 12:21 a.m. (R.T. of Apr. 26, 2011, at 18.) He saw an overturned pickup truck and a white Toyota Camry with Defendant seated in it. (*Id*. at 18–19.) He said Defendant was looking straight ahead, and had bloodshot, watery eyes that were dilated. (*Id*. at 19–20, 22–23.) From this information, he believed this was a possible DUI. (*Id*. at 20.) Officer Chase arrived shortly thereafter and took over the investigation. (*Id*. at 20–21, 35.)

Officer Michael Chase testified he was on duty on June 25, 2010, when he responded to a collision at 19th Avenue and Glendale Avenue at about 12:21 a.m. (R.T. of Apr. 26, 2011, at 25.) He saw a pickup truck on its side and a white Toyota Camry that had been driven by Defendant. (*Id*. at 25–26.) He saw Defendant had bloodshot, watery eyes, and would not say anything. (*Id*. at 26.) This indicated the possibility of a DUI. (*Id*. at 29–30.) He rode with Defendant in the ambulance to the hospital and asked another officer to monitor the situation. (*Id*. at 29, 30–31.)

Officer Virginia Wuollet testified she was on duty on June 25, 2010, and responded to the John C. Lincoln Hospital at 12:45 a.m. in connection with a traffic collision involving Defendant. (R.T. of Apr. 26, 2011, at 49–50.) She was contacted by the treating doctor, Dr. Lumpkin (a female). (*Id*. at 50, 52, 86.) When the prosecutor asked what Dr. Lumpkin said about Defendant, Defendant's attorney objected on the basis of hearsay. (*Id*. at 50.) Because the proceeding was a motion hearing and because the information involved medical treatment, the trial court overruled the objection. (*Id*.) Officer Wuollet said Dr. Lumpkin said Defendant's behavior indicated to her Defendant had some kind of chemical impairment. (*Id*. at 50, 52.) Officer Wuollet relayed that information to Officer Lawler, who asked her to obtain a portion of the blood drawn from Defendant. (*Id*. at 50.) Officer Wuollet then obtained a vial of Defendant's blood and gave it to Officer Lawler when he arrived at the hospital. (*Id*. at 51, 53.)

Tracy Parks testified he was a phlebotomist at John C. Lincoln Hospital on June 25, 2010. (R.T. of Apr. 26, 2011, at 44.) At about 1:03 a.m., he drew six vials of blood from Defendant for medical purposes. (*Id*. at 44–46, 48.) One of the officers asked for one of the vials of blood, and Mr. Parks gave him the grey-topped tube. (*Id*. at 46, 47.)

Officer James Lawler testified he was on duty on June 25, 2010, and contacted Officer Wuollet, who was at the hospital. (R.T. of Apr. 26, 2011, at 54–55.) When Officer Wuollet told him personnel at the hospital said they thought Defendant was impaired, he told Officer Wuollet to obtain a portion of the blood taken from Defendant. (*Id*. at 55, 59, 88.) Part of the information was that Defendant had track marks on one of his arms. (*Id*. at 59–61, 73–74, 87–88.) Officer Lawler later looked at Defendant's arm and saw the track marks. (*Id*. at 65, 67, 69–70, 88.) Officer Lawler obtained the blood sample from Officer Wuollet and sent it to the crime lab for analysis. (*Id*. at 55–56.)

After hearing arguments from the attorneys, the trial court found the State had presented sufficient information to show the officers had probable cause to believe Defendant was driving under the influence and therefore denied Defendant's Motion To Suppress. (R.T. of Apr. 26, 2011, at 121–22.) The matter then proceeded to a jury trial, and part of the evidence presented was testing of Defendant's blood sample showed BAC readings of 0.2379 and 0.2399. (Plaintiff's Exhibit 3.) After hearing the evidence, the jurors found Defendant guilty of all four DUI charges. (R.T. of Oct. 12, 2011, at 169.) The trial court found Defendant responsible for the charge of failing to stop for a red light and found the State had proved Defendant had a prior conviction. (*Id*. at 169–70.) The trial court then imposed sentence. (*Id*. at 170–74.) On October 17, 2011, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

A. *Did the officers have probable cause to believe Defendant was driving under the influence.*

Defendant contends the officers did not have probable cause to believe he was driving under the influence and therefore the officers did not have the authority to obtain a portion of the blood the hospital had taken from him. The Arizona statute provides as follows:

> E. Notwithstanding any other law, if a law enforcement officer has probable cause to believe that a person has violated § 28–1381 and a sample of blood, urine or other bodily substance is taken from that person for any reason, a portion of that sample sufficient for analysis shall be provided to a law enforcement officer if requested for law enforcement purposes.

A.R.S. § 28–1388(E). The Arizona Supreme Court has held officers are permitted to obtain blood from a suspect under this statute if (1) probable cause exists to believe the person has violated the DUI statute; (2) exigent circumstances are present and, (3) the blood is drawn for medical purposes by medical personnel. *State v. Cocio*, 147 Ariz. 277, 286, 709 P.2d 1336, 1345 (1985); *accord, Lind v. Superior Ct.*, 191 Ariz. 233, 236–37, 954 P.2d 1058, 1061–62 (Ct. App. 1998). Defendant does not dispute that requirements (2) and (3) were met; Defendant challenges only requirement (1) (probable cause).

In reviewing a trial court's ruling on a motion to suppress, an appellate court is to defer to the trial court's factual determinations, including findings based on a witness's credibility and the reasonableness of inferences the witness drew, but is to review de novo the trial court's legal conclusions. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 75, 81 (2004); *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Olm*, 223 Ariz. 429, 224 P.3d 245, ¶ 7 (Ct. App. 2010). A police officer has probable cause for an arrest if the officer has reasonable grounds to believe the person arrested has committed or is committing an offense. *State v. Lawson*, 144 Ariz. 547, 553, 698 P.2d 1266, 1272 (1985). In reviewing whether probable

cause exists, courts look to the totality of the facts and circumstances known to the officers at the time of the arrest. *Lawson*, 144 Ariz. at 553, 698 P.2d at 1272. In the present case, Defendant was driving a motor vehicle. The facts and circumstances known to the officers at the time were as follows: (1) Defendant was driving late at night; (2) Defendant had run a red light and collided with another vehicle; (3) Defendant's eyes were bloodshot and watery; (4) Defendant's eyes were dilated; (5) Defendant was unresponsive to questions; (6) medical personnel told the officers Defendant appeared impaired; and (7) Defendant had track marks on his arm. Based on that information, this Court concludes the trial Court properly found the officers had probable cause to believe Defendant was driving under the influence.

B. *Did the trial court abuse its discretion in considering the out-of-court statement*.

Defendant contends the trial court abuse its discretion in considering hearsay testimony at the hearing on his motion to suppress. The Arizona Supreme Court has held a trial court may consider hearsay testimony in deciding issues presented in a motion to suppress. *State v. Keener*, 110 Ariz. 462, 465, 520 P.2d 510, 513 (1974); *citing McCray v. Illinois*, 386 U.S. 300 (1967). The trial court therefore did not abuse its discretion in considering the out-of-court statement.

Further, in the context of the motion to suppress, the out-of-court statement here did not meet the definition of hearsay. At the time on the hearing in this matter, hearsay was defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(c), ARIZ. R. EVID. The out-of-court statement was that Defendant appeared impaired, which is an assertion. It was not, however, offered to proved the truth of the matter asserted (that Defendant was impaired), but was instead offered to show whether the officers had reliable information that would lead them to believe Defendant was impaired. The information came from Defendant's treating doctor, Dr. Lumpkin, which was sufficient for the trial court to conclude Dr. Lumpkin was a reliable source of information. The trial court therefore did not abuse its discretion in overruling Defendant's hearsay objection.

On appeal, Defendant cites *Crawford v. Washington*, 541 U.S. 36 (2004), and contends this testimony violated his Sixth Amendment right of confrontation. An objection at trial for one reason or purpose does not preserve for appeal a claim of error based on a different reason or purpose. *State v. Womble*, 225 Ariz. 91, 235 P.3d 244, ¶¶ 10–13 (2010) (on appeal, defendant contended testimony about what jail informant told detective violated his rights under Confrontation Clause; because defendant objected at trial only on basis of hearsay and not on basis of Confrontation Clause violation, court reviewed for fundamental error only); *State v. Damper*, 223 Ariz. 572, 225 P.3d 1148, ¶ 8 (Ct. App. 2010) ("hearsay" objection did not preserve for appellate review claim that admission of out-of-court text message violated Sixth Amendment right of confrontation; court review for fundamental error only). In the present case, Defendant objected to the testimony only on the basis of hearsay, thus this Court may consider his claim of a Sixth Amendment violation for fundamental error only.

The United States Supreme Court has held the right of confrontation is a trial right. *Kentucky v. Stincer,* 482 U.S. 730, 737 (1987); *Pennsylvania v. Ritchie,* 480 U.S. 39, 52 (1987); *California v. Green,* 399 U.S. 149, 157 (1970). The State has cited numerous cases from other jurisdictions holding the confrontation rights described in *Crawford* do not apply in a pretrial hearing, such as a hearing on a motion to suppress. (Appellee's Memorandum at 5–7.) Moreover, in *Crawford* itself, the Court stated, "The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford,* 541 U.S. at 59 n. 9. As noted above, the out-of-court statement by Dr. Lumpkin was not offered to proved the truth of the matter asserted (that Defendant was impaired), but was instead offered to show whether the officers had reliable information that would lead them to believe Defendant was impaired. This Court therefore finds no error in the admission of this testimony, fundamental or otherwise.

III. CONCLUSION.

Based on the foregoing, this Court concludes the properly denied Defendant's Motion To Suppress.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Phoenix Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Phoenix Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT 071820121120